Dear IPAS Associates/Fellows,

We are glad to bring you the IPAS Update on the recent trends and developments in the insolvency profession.

Message from Chairman

Dear Associates/Fellows

This is one of a series of technical updates for Associates and Fellows as part of our initiatives to provide relevant technical knowledge in our ongoing Continuing Professional Education.

Members are encouraged to contribute articles of interest and share some of their expertise with colleagues in our profession, which can only be for the good of the profession as a whole.

Yours sincerely,
DON M HO, FIPAS
Chairman

Join IPAS

Invitation to join the Insolvency Practitioners Association of Singapore Limited (IPAS)

Pursuant to the recommendations of the Company Legislation and Regulatory Framework Committee, the Insolvency Practitioners Association of Singapore Limited (IPAS) was incorporated on 12 April 2005 with the support of the

Technical Updates

INJUNCTION TO RESTRAIN WINDING UP PETITION

Jurong Shipyard Pte Ltd v. BNP Paribas [2008] SGHC 86

In *Jurong Shipyard Pte Ltd v. BNP Paribas* [2008] SGHC 86, the Singapore High Court considered an application for an injunction to restrain the commencement of winding up proceedings. The Applicant had entered into a number of foreign exchange transactions pursuant to International Swap Dealers Association Master Agreements ("ISDA Master Agreements") with several commercial banks in Singapore, including the Respondent. The Applicant argued that many of these transactions were unauthorized and illegitimately entered into by one of its directors (the "Alleged Unauthorized Transactions") and attempted to close out the Alleged Unauthorized Transactions with its counterparties, including the Respondent, so as to minimize the its losses. These proceedings centered on the interpretation of an agreement to close out one of the Alleged Unauthorized Transactions with the Respondent (the "Close Out Agreement"). The Singapore High Court held that there were sufficient triable issues with respect to the insolvency of the Applicant to grant an injunction to restrain the presentation of a winding petition. In the course of deciding so, the Singapore High Court considered the following issues.

First, the Singapore High Court had to consider the admissibility of hearsay evidence in these proceedings and whether or not these proceedings were interlocutory in nature. If so, they would fall under Order 41 Rule 5(2) of the Singapore Rules of Court which provides that hearsay evidence is admissible in interlocutory proceedings. Upon close examination of *Bryanston Finance Ltd v. De Vires (No. 2)* [1975] 2 WLR 41, the Singapore High Court came to the conclusion that the full context of each proceeding must be examined before deciding if it was interlocutory. It proceeded to find that these proceedings did not require a decision on the merits of the Respondent's claims against the Applicant and only required a decision on whether triable issues with respect to the Applicant's debts arose. Accordingly, these proceedings were interlocutory and hence hearsay evidence was admissible. Further, it was held that *"the present originating summons is a prime example of an application where the circumstances are of great urgency and evidence is not obtainable at short notice, and the object is either to keep matters as they are or to prevent the happening of serious or irremediable harm."*

Second, the Singapore High Court considered if there were triable issues with respect to the Applicant's debts. The Respondent had

Institute of Certified Public Accountants of Singapore (ICPAS), the Law Society of Singapore (Lawsoc) and the Official Receiver and Official Assignee. The members of IPAS are ICPAS and the Lawsoc.

IPAS cordially invites you to apply to be an Associate or a Fellow of IPAS and participate in our series of CPE courses, seminars and technical discussions on the specialist subjects of insolvency, restructuring and individual & corporate recoveries. Membership has advantages.

For the invitation letter and application form, please visit our website at www.ipas.org.sg

argued that the Applicant was under an existing obligation to pay its debts to the Respondent pursuant to the Close Out Agreement as well as an ISDA Master Agreement. However, upon scrutiny of the Close Out Agreement, the Singapore High Court found that no obligation to pay arose from the same. In particular, the Singapore High Court found that a reservation clause in the Close Out Agreement, *"proceedings in court in the event of non-settlement on the value date or otherwise, at law or pursuant to the Master Agreement"*, did not determine the issue of whether the Application had an obligation or option to pay its alleged debt to the Respondent. Further, the Singapore High Court was of the opinion that the Close Out Agreement aimed only to stop further losses being incurred by the Applicant. When considering the legal effect of the ISDA Master Agreement, the Singapore High Court found that there were sufficient triable issues with respect to whether or not the Alleged Unauthorised Transactions were executed *ultra vires* of the errant director's authority as an agent of the Applicant and whether the Respondent had knowledge of the same.

On these grounds, the Singapore High Court granted the injunction to restrain the Respondent from presenting a winding up petition against the Applicant. Generally, this decision reiterates several trite points of law. It also confirms that applications for injunctions to restrain the presentation of winding up petitions are interlocutory in nature. The Singapore High Court's interpretation of the Close Out Agreement should also prompt insolvency practitioners into closer scrutiny and care when drafting similar agreements. In particular, to specify with sufficient clarity whether and when an obligation to pay occurs.

Litigation in aid of foreign liquidation where the creditor is the foreign revenue

Relfo Ltd (in liquidation) v. Bhimji Velji Jadva Varsani [2008] SGHC 105

In *Relfo Ltd (in liquidation) v. Bhimji Velji Jadva Varsani* [2008] SGHC 105, the Plaintiffs claimed that a sum of US$878,479.35 was credited to the Defendant's bank account in Singapore by reason of breach of trust or fiduciary duty on the part of the Plaintiffs' director. Accordingly, the Plaintiffs claimed for return of the money on the basis that the Defendant received the money knowing of the breach of duty or dishonestly assisted in the breach of duty. At the time when proceedings were commenced, the only creditors of the Plaintiffs were the Her Majesty's Commissioners for Revenue and Customs ("HMRC"). Although at the time of the Plaintiffs' liquidation there had been another creditor of the Plaintiffs, who subsequently withdrew his claims.

The Singapore High Court found that the Plaintiffs had established all the elements of their claims. However, it dismissed the Plaintiffs' claims on the basis that allowing the same would amount to enforcement of United Kingdom's revenue laws. In doing so, the Singapore High Court applied the principles found in *Peter Buchanan Ltd v. McVey* [1955] AC 516 which provide that a court will not allow a liquidator to enforce the claims of a company in

liquidation on behalf of a foreign revenue service. The Singapore High Court put some consideration into the Plaintiffs' submission that a liquidator technically acts to enforce the claims of a company in liquidation and not its creditors but opined that where the foreign revenue service is the only creditor at the time when proceedings are heard it can be safely said that the proceedings amount to enforcement of the foreign revenue service's claims.

On one hand, this decision is the first instance of direct application of the principle that a court will not assist in the direct or indirect enforcement of a foreign revenue law and that this principle will also apply to actions commenced by liquidators of foreign companies where the foreign revenue service is the sole creditor. On the other hand, this decision, insofar as it applies to foreign liquidators may also face some conceptual difficulties. For instance, it does not specify how much interest the foreign revenue service should have in the liquidation and the ensuing litigation for the principle to apply. What happens if there are two creditors, one of whom is the foreign revenue service and the other is a minority creditor who has a very small claim? The Singapore High Court seems to entertain the possibility that the principle would not apply in such a case. However, is the distinction is such a case real? After all, a substantial portion of the proceeds of litigation would go to the foreign revenue service in such a case as well. It remains to be seen how far this principle will be taken by the Singapore courts.

Liquidators' powers to examine

Foxman v. Credex [2007] NSWSC 1422

In *Foxman v. Credex* [2007] NSWSC 1422, the liquidator of the Respondent company had applied for summons to examine the various individuals related to trading activities of a related company of the Respondent. Further, the summons to examine also related to trading activity purportedly conducted by the Respondent during a period of time when the Respondent company had been temporarily de-registered. This application was made to set aside these summons on the basis that the examinations constituted an abuse of process as they were incapable of yielding any tangible benefit for the Respondent or its creditors. It was alleged that the examinations were undertaken with the predominant purpose of providing a forensic advantage in other proposed litigation of individuals including the Appellant, a creditor of the Respondent. Finally, it was alleged that the subject matter of the examinations was beyond the scope of "examinable affairs" as provided by Section 596A and Section 596B of the Australian Corporations Act as they related to events that occurred while the Respondent company had been de-registered.

First, the Supreme Court of New South Wales did not find that the summons was made for an improper purpose on the part of the Appellant or the liquidator. Second, it held that the event that occurred while the Respondent company had been de-registered were relevant as one of purposes of the liquidator conducting the examination was to investigate whether, following the Respondent company's de-registration, persons involved in the Respondent

company's trading activity continue to represent that the Respondent company was trading without any relevant change.

This decision provides a good juxtaposition against Singapore authorities on a liquidator's summons for examination. However, it should be read with caution given that the Australian Corporations Act provision is not in pari material with Section 285 of the Singapore Companies Act and given Rajah JA's warning in *Liquidator of W&P Piling Pte Ltd v. Chew Yin What and others* [2004] SGHC 108 that *"(t)he relevant English and Australian legislation have been radically overhauled and in many fundamental ways have now departed radically from their original scheme and philosophy, from which the Singapore legislation has drawn significant inspiration. Real caution must now be exercised in evaluating the relevance of recent English and Australian authorities in insolvency matters, including this area of 'deposition' taking."* In the same case, Rajah JA found that the threshold test should be whether the information or documents sought in the examination are reasonably required *"to facilitate the liquidator's attempt to ascertain the true facts in relation to the affairs of the company, its dealings and trading activity and so on."* Thus, *Foxman v. Credex* [2007] NSWSC 1422, to this extent, may represent an increased congruence between Australian and Singaporean jurisprudence on this issue.

Disclaimer: This email is intended for the use of the addressee. If you are not the intended recipient of this message, kindly notify us at **technical@icpas.org.sg**. While all reasonable care has been taken in the preparation of information contained in this update, IPAS takes no responsibility for any action (s) taken on the basis of information contained herein or for any errors or omissions in that information.

Insolvency Practitioners Association of Singapore Limited (IPAS)
Company Registration Number 200504856G
20 Aljunied Road, #06-02 CPA House, Singapore 389805
Telephone: +(65) 6749 8060, Fax: +(65) 6749 8061,
email: technical@icpas.org.sg, website: www.ipas.org.sg